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LIABILITY FOR ENTREPRENEURIAL RISK DECISIONS DURING THE COVID-19 CRISIS

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ABSTRACT

The article deals with the liability of board members for decisions to minimize business risks resulting from the pandemic. Based on an important decision by the highest German criminal court on a case of the 2008 financial crisis, the article outlines the limits of a safe haven within which managers can make decisions without fear of legal consequences.

The rapidly spreading pandemic is putting companies under considerable pressure. Boards of directors and managing directors have to make far-reaching decisions in the shortest possible time with considerable uncertainty in forecasts. It is clear that not every decision will have the desired success; some will perhaps cause more harm than good.

This also raises the question of civil or even criminal liability risks. A decision made by the BGH (German Federal Court of Justice) from 2016 is of considerable importance to answering this question. It was based on facts that show structural parallels to the current situation. This refers to the decision on the criminal liability for breach of trust of those responsible at HSH Nordbank who, under great time pressure during the financial crisis of 2007, carried out a transaction to relieve the burden of debt, but who – as became apparent later – thus caused the bank to incur a loss of just under EUR 150 million[1].

The responsible persons at HSH Nordbank – like many members of the management board in the current crisis – had to make an atypical risk decision. The object of its activities is not the ordinary course of business, which entails risks as well as new opportunities. Rather, measures are required to reduce risks arising from a sudden change in the business environment, the dynamics of which are hardly foreseeable. Mitigating these risks may require measures that would have been unthinkable just a few days ago – from abandoning a transaction to postponing urgently needed investments, temporarily closing plants or applying for government deposits.

When it comes to crisis management, board members and managing directors operate in front of an open horizon, just like politics: Only the future will tell whether the drastic measures are ultimately necessary and successful – but action must be taken now. In contrast to politics, however, managers and entrepreneurs bear a considerable personal liability risk. If they act wrongly, they not only risk loss of reputation and, in the worst case, of office, but also substantial legal consequences.

As a result, those responsible in companies find themselves in a dilemma situation in which both options for action – immediate action and further waiting – are risky and in which every decision made may prove to be wrong in retrospect. It would therefore be highly unfair to make the occurrence of legal consequences dependent on the outcome of the decision. In addition, a "negative success liability" would have harmful effects on companies and the economy, as it would lead to a slowing down and distortion of decision-making processes: Managers may be inclined to act only at a time when an option has

1 BGH, NJW 2017, 578 with comments from Alexander Baur & Maximilian Holle, *Untreue und unternehmerische Entscheidung*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT, 555 (2017); Michael Kubiciel, *Anmerkung*, JURISTISCHEZEITUNG, 72, 585 (2017); Alaor Leite, Prozeduralisierung oder Rechtsgüterschutz bei der Untreue? - Risikoverringerung in der Unternehmenskrise am Beispiel der HSH-Nordbank-Entscheidung (BGH NJW 2017, 578), 580 (2018); Ulrich Leimstoll, *Erfordernis einer gravierenden Pflichtverletzung beim Untreuetatbestand (»HSH Nordbank«)*, STRAFVERTEIDIGER, 388 (394) (2017).

expired or has proven to be clearly incorrect. Valuable time to reduce risks for the company would then be lost.

In order to prevent this, case law (with different approaches that are not always consistent) is trying to limit liability risks. In its HSH Nordbank decision, the 5th Criminal Division of the BGH (German Federal Court of Justice) clarified that a violation of (stock corporation law) due diligence obligations is only present in the case of "absolutely unjustifiable" conduct[2].

It is important to know that the Criminal Division does not interpret § 266 StGB (German Penal Code) here, but rather interprets § 93 para. 1 AktG (German Stock Companies Act), to which the accessory offence of breach of trust refers. The remarks of the Criminal Division on the clarification of the scale of obligations are therefore just as relevant for the application of company and liability law as for § 266 StGB.

According to the opinion of the 5th Criminal Division, an "unjustifiable action" is only present if the mistake has already forced itself upon an outsider. What sounds like a very wide scale, however, becomes considerably narrower when one reads the further remarks of the Division. Such an error could also consist in the inadequate collection and analysis of information prior to a decision.

However, case law also accommodates decision-makers in a crisis situation. It is necessary, but also sufficient, for the board of management to obtain an "appropriate" factual basis, taking into account the time factor and weighing up the costs and benefits of further information acquisition. It is not important that the decision was actually taken on the basis of adequate information and in the best interest of the company. Rather, it should suffice that the board of management was "reasonably" allowed to assume this at the time of the decision.

These – admittedly soft – criteria provide the decision-makers in the companies with what they now need most urgently: a sufficiently large "safe haven" for decisions.

2 for this criterion, see Michael Kubiciel, *Gesellschaftsrechtliche Pflichtwidrigkeit und Untreuestrafbarkeit*, NEUE ZEITSCHRIFT FÜR STRAFRECHT, 353 (2005).